United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

To be argued by
JAY GOLDBERG

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

76-1114

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P/S

UNITED STATES OF AMERICA,

Appellee,

-against-

DONALD PAYDEN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANT
DONALD PAYDEN

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REPLY BRIEF FOR THE APPELLANT DONALD PAYDEN

The only point to which we will respond relates to the appellant's claim of improper joinder and prejudice thereby. That Count Four in the redacted indictment (referred to as Count "Six" at A 34) was improperly joined is not disputed. The government's claim is that the misjoinder issue was waived and in no event, did its inclusion produce undue prejudice to the appellant.

As first presented, the original indictment would have withstood a misjoinder motion under FRCrP 8(b) by reason of the broad multi-defendant conspiracy count. It was only when the government acknowledged on October 28, 1975 that appellant was not a party to any conspiracy involving the Bells and Vernon that misjoinder of then Count Six became

apparent. The government states that when it so acknowledged the multiple conspiracies on October 28, appellant's trial counsel was on notice from that day on. What is wrong with this argument by the government is that on October 28 government counsel by his motion to sever counts, including then Count Six, obviated any need for the defense to move to sever Count Six. On that day, though the court did not then act, there was no real risk of a trial with the misjoined Count Six by reason of the government's motion to drop the count. The defense could therefore be at ease.

However, on the morning of the trial - the very day of the commencement of the taking of testimony - the government altered its position and only then represented that *it would include* Count Six (which was treated as Count Four at trial - A 618) simply because the co-defendant's lawyer had requested it (A 80). Thus, it was not until the morning of the trial that defense counsel was confronted with the misjoinder issue, for up until that time the government had represented it would not include then Count Six on the trial of the defendants.

Perhaps had there been a reasonable amount of time to prepare, trial counsel for both sides would have spotted the issue. Appellant's counsel repeatedly prayed for a

respectable time to consider the government's changing positions to no avail.

As a result of the foregoing, the misjoinder motion could not have been made between arraignment October 21 to November 13, the latter date being the day of trial since up until November 13 the government made it clear it did not intend to try Count Six. Only after the expiration of the ten days allowed for motions, did government counsel change his position, at the claimed request of counsel for the co-defendant, and assert the right to include Count Six. Misjoinder appeared as a real risk only from November 13 on.

The court below was clearly erroneous in holding that the motion addressed to misjoinder could have been made within ten days of arraignment, i.e. October 21-31, 1975. So too, the court below was erroneous in holding that the appellant was not substantially prejudiced by inclusion of the count. (See our discussion at pp. 21-23 of the main brief.)

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED.

May 27, 1976

Respectfully submitted,

JAY GOLDBERG
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Attorney for